Supreme Court, U.S.
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No. 95-744

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GILBERT, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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20 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the union did not violate Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by stating its intention to cause the discharge of a union member pursuant to a valid union-security agreement if he ceased paying dues after he had been subjected to lawful union disciplinary action.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Communications Workers v. *Beck*, 487 U.S. 735 (1988) 15

International Ass'n of Machinists, District Lodge 94 (McDonnell Douglas Corp.), 283 N.L.R.B. 881 (1987) 10, 14

Local 1104, Communications Workers v. *NLRB*, 520 F.2d 411 (2d Cir. 1975), cert. denied, 423 U.S. 1051 (1976) 16

Local 4186, United Steelworkers (McGraw Edison Co.), 181 N.L.R.B. 992 (1970) 6, 14

NLRB v. *General Motors Corp.*, 373 U.S. 734 (1963) 11

NLRB v. *Pipefitters Union Local No. 120*, 719 F.2d 178 (6th Cir. 1983) 16

Pattern Makers' League v. *NLRB*, 473 U.S. 95 (1985) 14, 15

Scofield v. *NLRB*, 394 U.S. 423 (1969) 2, 14, 16, 17

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

§ 7, 29 U.S.C. 157 ..... 2, 6, 8, 14, 16

§ 8(a)(3), 29 U.S.C. 158(a)(3) 2, 3, 9, 10, 11, 12, 13, 15, 16

§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 2, 5, 6, 7, 8, 11, 14, 16

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 56 F.3d 1438. The decision and order of the National Labor Relations Board and the decision of the administrative law judge (Pet. App. 19a-55a) are reported at 312 N.L.R.B. 218.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1995. A petition for rehearing was denied on August 16, 1995. Pet. App. 56a-57a. The petition for a writ of certiorari was filed on November 9, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 8(b)(1)(A) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(b)(1)(A), makes it unlawful for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in [Section 7 of the Act, 29 U.S.C. 157]." Section 7, in turn, gives employees the right to engage in a range of activities in support of collective bargaining, and also gives them the right to refrain from such activities "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [Section 8(a)(3), 29 U.S.C. 158(a)(3)]." A proviso to Section 8(b)(1)(A) adds that the Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. 158(b)(1)(A). That proviso permits a union to impose internal discipline on a member for violating a union rule where the rule "reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969).

Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization," but that Section contains two provisos authorizing union-security agreements between employers and unions, and limiting the

circumstances in which such agreements may be imposed. The first proviso authorizes a union and an employer to require as a condition of continued employment that all employees in the bargaining unit establish and maintain membership in the union. The second proviso prohibits the discharge of an employee pursuant to a union-security agreement where (A) "such membership was not available to the employee on the same terms and conditions generally applicable to other members," or (B) "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." *Ibid.*

b. Before 1984, Local 100 of the Cement, Lime, Gypsum and Allied Workers International Union (Cement Workers) represented a unit of employees at the Kaiser Cement Corporation's facility in Permanente, California. In April 1984, the Cement Workers merged with the International Brotherhood of Boilermakers (Union), and Local 100 of the Cement Workers became Local D-100 of the Boilermakers (Local). Petitioner, a long-time Kaiser employee, had been president of Local 100 since 1977, and remained president of the Local after the merger. Although petitioner and others in Local 100 had not favored the merger, they took no action to oppose the Union until 1986. Pet. App. 20a, 29a.

On September 16, 1986, dissatisfied with the Union's termination of four union representatives who had been long-term officials of the Cement Workers, petitioner wrote a letter to the president of the international union asking that the termination of one of those representatives be reconsidered. The president refused the request. In July 1988, peti-

tioner prepared and circulated a petition requesting a Board election so that the bargaining unit employees could choose a new international union to represent them. All but one of the employees in the unit signed the disaffiliation petition, but it was never filed with the NLRB. Pet. App. 5a, 20a-21a, 29a-31a.

On September 22, 1988, at a meeting of Local D-100's membership, petitioner presented a "Letter of Understanding" written by the company, which proposed to convert the jobs of 17 unit employees, including petitioner, to salaried supervisory positions, thereby removing them from the collective bargaining unit and representation by the local. While petitioner took no formal position on the proposal, he described the proposal's benefits as the company had represented them. Local D-100 Financial Secretary Donald Hall attended the meeting, and also took no position on the proposal. Unit employee Arthur Rose, however, spoke in favor of it. The bargaining unit employees rejected the proposal by a vote of 23 to 11. About two weeks later, Joseph Gaxiola, a trustee of Local D-100, circulated a petition asking for the unit employees' view on a proposal to make all bargaining unit positions salaried, thereby eliminating the unit. Gaxiola supported the proposal, but again a majority of the unit employees opposed it. Pet. App. 5a-6a, 21a-22a, 32a-37a.

In October 1988, a bargaining unit employee filed internal Union charges against petitioner, Hall, Rose, and Gaxiola, alleging that they had engaged in activities in support of removing persons from the bargaining unit, in violation of the Union's constitution. After a hearing before a representative of the International, the Union found the four employees guilty of all charges and barred them from holding

any Union office or attending any Union meetings, except those called to vote on the ratification of contracts directly affecting them. Those penalties were applied to petitioner for five years, Hall for three years, and Gaxiola and Rose for two years. Pet. App. 6a, 22a, 37a-40a.

In April 1989, in a joint letter to the Union president, the four disciplined employees asserted that they had been effectively suspended from the Union and therefore no longer were obligated to pay union dues. In a letter dated May 22, 1989, the president responded that the four employees had not been suspended and must continue to pay dues in order to remain members of the Union in good standing. In a subsequent letter dated July 20, 1989, the disciplined employees asked what penalties might be imposed on them if they stopped paying dues. The president replied that the Union's contract with the company contained a union-security clause and that, if the four employees ceased paying dues, the Union would so notify the company, and the employees would no longer be permitted to work at the plant. Nevertheless, petitioner stopped paying his dues for two months. He resumed payment, however, when the company notified him that the Union had requested his discharge under the union-security agreement. Petitioner thus was not dismissed from his employment. Pet. App. 6a, 22a-23a, 40a-45a.

2. a. On October 6, 1989, petitioner filed with the NLRB an unfair labor practice charge against the Union under Section 8(b)(1)(A) of the NLRA. On December 14, 1989, the NLRB's General Counsel issued a complaint against the Union. An administrative law judge (ALJ) recommended that the General Counsel's complaint be dismissed. Pet. App.

27a-55a. The ALJ rejected the General Counsel's contention that the Union's discipline of petitioner and the three other employees was unlawful under Section 8(b)(1)(A). He concluded that the Union had the right to protect itself against the activities of the four disciplined employees, which could have resulted in the erosion or elimination of the bargaining unit that the Union represented. He found that the Union's constitution, barring such erosion of its status as collective bargaining representative, had been reasonably enforced against the four employees, who at all times were free to leave the Union to escape those rules (while continuing to pay dues as required by the union-security clause), but had not done so. *Id.* at 48a-53a.

The ALJ next held that the Union did not violate the NLRA by threatening to invoke the union-security agreement. The Union's statement of its intention to invoke the agreement was lawful, he concluded, because the employees had not been disciplined for the exercise of any rights protected by Section 7 of the Act, 29 U.S.C. 157. Pet. App. 53a. Section 7 gives employees the right to engage in and to refrain from activities in support of collective bargaining, except to the extent that any such right may be affected by a union-security agreement. Because no Section 7 rights were involved, the ALJ distinguished this case from cases relied on by the General Counsel, in which the Board had held that a union violated Section 8(b)(1)(A) of the Act by threatening to invoke a union-security clause against employees who had been disciplined in various ways for the exercise of certain Section 7 rights. Pet. App. 53a (citing *Local 4186, United Steelworkers (McGraw Edison Co.)*, 181 N.L.R.B. 992 (1970)).

Finally, the ALJ rejected the General Counsel's alternative argument that, even if the activities for which the employees were disciplined were not protected, their membership rights were so substantially reduced that enforcement of the union-security clause against them became unlawful. That argument, the ALJ reasoned, would present the Union with the "Hobson's choice" of either forgoing its right to discipline members under the proviso to Section 8(b)(1)(A),[1] thereby rendering that proviso a nullity, or relinquishing its right to enforce the provisions of a valid union-security agreement and facing self-destruction through loss of the dues of disciplined members. Pet. App. 54a. The ALJ added that the General Counsel's position, if implemented, would induce any members who are unwilling to pay dues in the first place for financial or philosophical reasons to subject themselves to union discipline "so they would be 'punished,' by not having to pay union dues, although they would continue their employment." *Ibid.*

b. The NLRB adopted the ALJ's recommendation. Pet. App. 19a-27a. The Board held that the Union had lawfully disciplined petitioner and the other employees. The Board noted that there are limitations on a union's right to discipline members, such as the requirement that employee-members must always remain free to resign their membership and thereby escape union rules and discipline. But the

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[1] The proviso to Section 8(b)(1)(A) provides that the prohibitions of that Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. 158(b)(1)(A).

Board stated that employees who "have opted for continued membership * * * cannot be heard to complain if the union enforces the rules of membership." *Id.* at 25a. The Board further noted that a union may not adopt a rule that "impairs a policy that Congress has embedded in the labor laws," such as a rule that would fine a member for exercising the "fundamental" Section 7 right of seeking access to the Board (by filing a petition or charge). *Ibid.* In this case, however, the Board found that petitioner and the other disciplined members were at all times free to resign their membership, but chose not to do so. Thus, the Union was authorized to discipline them, and "[t]he fact that the Union chose to discipline them by impairing their membership, rather than by expelling them or fining them, does not transform lawful discipline into unlawful discipline." *Id.* at 25a-26a. The disciplined members' actions implicated no fundamental Section 7 policy. *Ibid.*

Finally, the Board held that the Union's enforcement of the union-security agreement against the disciplined employees did not violate the NLRA. The Board stated that, "[b]ecause the [Union's] discipline of these members did not violate the Act, the members continued, as unit employees, to be required under the union-security agreement to satisfy the sole obligation a union may enforce under a union-security provision: the tendering of uniform initiation fees (if any) and dues." Pet. App. 26a (internal quotation marks omitted). The Board thus concluded that the Union "did not violate Section 8(b)(1)(A) of the Act by threatening to invoke the union-security clause against petitioner and the three other employee-members if they ceased paying dues after the [Union] disciplined them." *Ibid.* The Board emphasized that

the Union continued to have a duty of fair representation toward all employees, including those it had subjected to discipline. *Ibid.*

3. The court of appeals affirmed the Board's decision. Pet. App. 1a-18a. The court rejected petitioner's contention that the Union's threat to invoke the union-security agreement unless he paid his union dues was impermissible under the second proviso to Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3).[2] The court held that the mere fact that petitioner was deprived of certain membership privileges for violating valid Union rules that applied uniformly to every other member does not show that membership was not "available" to him on the same terms and conditions as other employees, within the meaning of the first condition to the proviso: "Membership was offered to [petitioner] on the same terms as it was to other employees. This membership, however, included both rights and obligations. When [petitioner] freely chose to violate his obligations, he was disciplined just as any other member would have been." Pet. App. 10a. Nor, in the court's view, did the Union's impairment of petitioner's membership rights place him within the second condition to the

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[2] The second proviso to Section 8(a)(3) states:

> That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

proviso. For, "even accepting [petitioner's] characterization that his membership rights were 'substantially impaired' for reasons other than nonpayment of dues, the fact remains that his Union membership was never 'denied' or 'terminated.'" *Id.* at 11a.

The court also rejected petitioner's contention that, even if the result reached by the Board were permissible under Section 8(a)(3), the Board's decision in this case was arbitrary and capricious, because the Board departed from its own precedent without adequate explanation. The court found that all but one of the prior cases relied on by petitioner are "sufficiently distinguishable" from the case at hand, and that, with respect to the one case that is arguably on point, *International Ass'n of Machinists, District Lodge 94 (McDonnell Douglas Corp.)*, 283 N.L.R.B. 881 (1987), "the Board's decision here provided adequate reasoning for and notice of the Board's departure from that case." Pet. App. 14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of this Court or any other court of appeals. This Court's review is not warranted.

In a holding affirmed by the court of appeals and not challenged by petitioner, the Board found lawful the Union discipline of petitioner that underlies his challenge to the requirement that he continue to pay dues. Pet. App. 25a. The issue here is whether the Board reasonably concluded that petitioner remained obligated, following that lawful discipline, to pay dues under the union-security agreement between the Union and company, so that the Union's threat to

seek petitioner's discharge for failure to comply with that obligation did not violate Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A).

1. a. Petitioner contends (Pet. 7-15) that the court of appeals decided an important issue that this Court left open in *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), in a way that he asserts is incompatible with the NLRA's terms and the Board's consistent prior interpretation of the Act. There is no merit to that contention.

In *General Motors*, the Court stated that, under the second proviso to Section 8(a)(3), "[i]t is permissible to condition employment upon [union] membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues." 373 U.S. at 742. It therefore upheld, as valid under the Act, an "agency shop arrangement" which "places the option of membership in the employee while still requiring the same monetary support as does the union shop." *Id.* at 744. The Court left "for another case" the "significance of desired, but unavailable union membership, or the benefits of membership, in terms of permissible [Section] 8(a)(3) security contracts." *Id.* at 745 n.12.

This case does not present the issue referred to in *General Motors*, however, because, like the agency shop arrangement in that case, "there is no closed-union aspect to the present proposal by the union." 373 U.S. at 745 n.12. The Court was referring to a situation in which an employee is excluded from the union, but is nonetheless required to contribute monetary support to the union. Petitioner was not refused membership or the benefits of membership; the union-security agreement in this case left him the option to become a full union member or merely a

dues payer, and he elected full union membership. As a full union member, he subjected himself to reasonable union discipline for violating valid union rules. To conclude that such discipline relieved petitioner of his dues-paying obligation under the union-security clause would place him in a better position than that of an employee who had opted only to give monetary support to the union.

Even if this case did present the issue left open in *General Motors*, review by this Court would not be warranted because, as the court of appeals held, the Board's resolution of the issue is reasonable and compatible with the Act's terms and policies. The court correctly held that the second proviso of Section 8(a)(3) was not violated, because the union subjected petitioner to the same discipline it would have imposed on any other member for the same violation of union rules. Pet. App. 10a-11a. In those circumstances, the court concluded, "the only reasonable conclusion is the one reached by the Board—membership in the Union was 'available' to [petitioner] on the same terms and conditions as it was to other employees." *Id.* at 11a.[3]

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[3] Petitioner contends (Pet. 13) that the court of appeals' holding "misses the point: once membership is substantially impaired it is *no longer* 'available to the employee on the same terms and conditions generally applicable to other members.' " However, the determination whether membership was "available" to an employee on equal terms should be made as of the time the employee applies for membership in the union, and not, as petitioner contends, after the union has lawfully disciplined him for violating its rules. Otherwise, any employee who was admitted to the union and later subjected to lawful discipline short of expulsion for breaking its rules could stop paying dues, and thus become a "free rider," simply by asserting that membership was no longer available to him

The court of appeals further correctly held that petitioner's membership rights were not "denied or terminated" for a reason other than nonpayment of dues within the meaning of Section 8(a)(3)'s second proviso. As the court of appeals observed, "even accepting [petitioner's] characterization that his membership rights were 'substantially impaired' for reasons other than nonpayment of dues, the fact remains that his Union membership was never 'denied' or 'terminated.'" Pet. App. 11a. The court added: "[Petitioner] was specifically told by the Union following his discipline that his membership had not been suspended, and [petitioner] chose not to resign his membership. [Petitioner] thus remained at all relevant times a full member of the Union," and the "discipline imposed on him was merely an *incident of that continued membership* in the Union." *Ibid.*

b. Petitioner contends (Pet. 9-12) that the Board's decision here overruled, without explanation, a long-standing prior construction of the Act. Petitioner relies on "a line of six Board decisions beginning with *McGraw Edison* [*Local 4186, United Steelworkers*, 181 N.L.R.B. 992 (1970)], and culminating with *Machinists District 94 (McDonnell Douglas)*, 283 N.L.R.B. 881 (1987)." Pet. App. 13a (parallel citation omitted). The court of appeals correctly distinguished all of those cases.

In *McGraw Edison*, the union disciplined an employee for filing a decertification petition with the Board, and then threatened to invoke a union-security clause to enforce his payment of dues. The Board held

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on equal terms. It is elementary that the Act's provisions should be read as mutually compatible rather than as self-contradictory.

that the union's threat violated Section 8(b)(1)(A), because imposition of discipline for petitioning the Board is "a serious restraint upon access to Board processes." 181 N.L.R.B. at 992; see *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969). As the Board explained here, access to the Board is a "fundamental" Section 7 right upon which all other rights under the Act depend. Pet. App. 25a n.7. By contrast, the conduct for which petitioner was disciplined did not involve the exercise of a fundamental Section 7 right, nor did the discipline impair any other statutory policy. In short, the discipline here was lawful.

In *McDonnell Douglas*, several employees resigned from the union, stopped paying dues, and returned to work during a strike. The union disciplined them by forbidding them from holding union office for five years, and threatened to invoke a union-security agreement based on their nonpayment of dues. 283 N.L.R.B. at 884-885, 892-893. Because a union has no right to discipline members after they have resigned from the union (see *Pattern Makers' League* v. *NLRB*, 473 U.S. 95 (1985)), the Board held that the union's discipline of the employees was unlawful. Here, by contrast, petitioner elected to remain a member of the Union, and thus was properly subject to Union discipline for violating a valid Union rule.[4]

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[4] The court of appeals also found the other four of the post-*McGraw Edison* cases relied on by petitioner to be "clearly distinguishable" from this case. "In each of those four cases," the court observed, "the union sought to enforce a union-security clause on employees who had either been *denied* membership, *expelled* from membership, or fully *suspended* from membership for engaging in various section 7 activities." Pet. App. 15a (citations omitted). The unions' actions in those cases thus "fell within the literal language of section 8(a)(3)'s

2. a. Contrary to petitioner's contention (Pet. 15, 17-18), the court of appeals' decision is not inconsistent with *Pattern Makers'*, *supra*, and *Communications Workers* v. *Beck*, 487 U.S. 735 (1988). *Pattern Makers'* held that the policy of voluntary unionism embodied in the Act permits employees freely to resign from the union and precludes a union from disciplining an employee for an infraction of union rules committed after he has resigned. 473 U.S. at 115-116. Petitioner, however, elected to remain a member of the Union and thus was properly subjected to discipline for violating valid Union rules.

In *Beck*, the Court held that the union-security provisos to Section 8(a)(3) do not obligate objecting dues-paying nonmember employees "to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 738, 745. *Beck* is inapposite here because petitioner has elected to become and remain a member of the Union, and has not objected that his dues payments would be used to support non-germane union activities. See Pet. App. 26a n.9. Indeed, *Beck* recognized that Congress's purpose in allowing union-security agreements was "to provide that there be no employees who are getting the benefits of union representation without paying for them." 487 U.S. at 750. To adopt petitioner's interpretation of the second proviso would, as the court of appeals explained,

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second proviso * * * because the unions had invoked or threatened to invoke union-security agreements against employees whose membership had been 'denied' or 'terminated' for reasons other than failure to pay dues." *Id.* at 16a n.4.

negate Congress's purpose. Pet. App. 12a; see also *id.* at 54a.

b. Decisions of other circuits (see Pet. 15-17) do not conflict with the decision of the court of appeals. In both *Local 1104, Communications Workers* v. *NLRB*, 520 F.2d 411 (2d Cir. 1975), cert. denied, 423 U.S. 1051 (1976), and *NLRB* v. *Pipefitters Union Local No. 120*, 719 F.2d 178 (6th Cir. 1983), the courts enforced Board decisions holding that unions had violated Section 8(b)(1)(A) by enforcing union-security agreements against employees who were denied membership as discipline for having supported a rival union (*Communications Workers*), or for arbitrary reasons (*Pipefitters*). The unions' actions in those cases thus fell within the plain terms of Section 8(a)(3)'s second proviso—the employees' membership had been "denied" or "terminated" for reasons other than failure to pay dues. See note 4, *supra*. By contrast, although petitioner's membership rights were restricted for a period, his membership in the Union was neither denied nor terminated.

3. Finally, there is no merit to petitioner's contention (Pet. 18-21) that the decision of the court of appeals conflicts with decisions of this and other courts holding that Section 7 of the NLRA protects dissident intra-union activities. None of the cases relied on by petitioner involved the kind of situation at issue here, in which a union member was disciplined for violating a legitimate union rule that is consistent with the policies that "Congress has imbedded in the labor laws." *Scofield*, 394 U.S. at 430. In such a situation, even if the member's conduct might be protected by Section 7, the proviso to Section 8(b)(1)(A) permits the union to discipline the

member for violating its rule, as long as the member was free, as was petitioner, to leave the union and escape the rule. See *Scofield*, 394 U.S. at 430; Pet. App. 24a-25a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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